IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MR. JUSTICE K.P.BALACHANDRAN

WEDNESDAY, THE 27TH JUNE 2007 / 6TH ASHADHA 1929

AS.No. 238 of 1996(A)

O.S.NO.2/1987 OF DISTRICT COURT, ALAPPUZHA DTD. 06/02/1996.
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APPELLANT/PLAINTIFFS:
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1. **"BHAGAVATHY MADOM TRUST",**
   MULLACKAL, ALLEPPEY,
   REPRESENTED BY 2ND PLAINTIFF.

2. **NATARAJAN, S/O. SADASIVAN ACHARI,**
   RESIDING AT LAYATHUPARAMBU,
   PUTHENANGADI WARD, ALAPPUZHA.

3. **V.K. SWAMINATHAN, S/O. KOCHITTAYATHI,**
   SAMI BHAVAN, UDAYA BUILDING,
   MULLACKAL, ALAPPUZHA.

BY ADV. SRI.M.V.IBRAHIM KUTTY,
SRI.K.RAVU

RESPONDENTS/DEFENDANTS:
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1. **SCHEDULE MAJOR MULLACKAL DEVASWOM,**
   ALLEPPEY, REPRESENTED BY TRAVANCORE
   DEVASWOM BOARD, REPRESENTED BY ITS SECRETARY.
   (DELETED AS PER ORDER ON I.A. NO. 532/92
   DTD. 20/08/1992).

A.S. NO. 238/1996:

**2. HARIHARA IYER, CHALAI STREET,
MYLAPORE, MADRAS.**

**3. S. NEELAKANTA IYER, KARUVELI MADOM,
THULAPRAMBU, NADUVATHU MURI,
HARIPADU VILLAGE,
(DELETED AS PER ORDER ON I.A. NO. 532/92
DATED 20/08/1992).**

**4. R. VENKITAKRISHNA IYER,
BHAGAVATHY MADOM, MULLACKAL,
ALLEPPEY (DIED).**

**5. PONNAMMAL, W/O. DECEASED RAMACHANDRA IYER
OF DO. DO.**

**6. KARUNAKARAN, PROPRIETOR, LADIES' STORES,
BHAGAVATHY MADOM, MULLACKAL, ALLEPPEY.**

**7. VIJAYAN, PROPRIETOR,
LAVANYA BAKERY AND COOL DRINKS,
BHAGAVATHY MADOM, MULLACKAL,
ALLEPPEY.**

**8. THE BRAHMANA SAMOOHAM, ALLEPPEY,
REG. NO. 47/74, REPRESENTED BY
SECRETARY, JAYAKRISHNAN, AUDITOR.**

**P. VENKITARAMA IYER, VENKITARAMA NIVAS,
SANADANAM WARD, ALLEPPEY (INCORPORATED
AS PER COMMON ORDER ON I.A. 371/88 DTD.
12/08/1988.**

**ADDL.9. CHARULEKSHMI, S/O. R. VENKITAKRISHNA IYER,
BHAGAVATHY MADOM, MULLACKAL, ALAPPUZHA,**

**(ADDL. D9 IS IMPLEADED AS L.R. OF DECEASED D4
AS PER ORDER ON IA.735/95 DTD. 05/08/95).**

**BY ADV. SRI.K.K.MOHAMMED RAVUF ,
SRI.B.S.KRISHNAN (SR.),
SRI.K.ANAND,
SMT.LATHA KRISHNAN.**

**THIS APPEAL SUITS HAVING BEEN FINALLY HEARD
ON 27/06/2007,THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

ORDER ON C.M.P. NO. 1570/1996 IN A.S. NO. 238/1996

DISMISSED

SD/- J.B.KOSHY, JUDGE.

27/06/2007. **SD/- K.P.BALACHANDRAN, JUDGE.**

//TRUE COPY//

prv.

J.B.Koshy & K.P.Balachandran, JJ.

A.S.No. 238 of 1996

JUDGMENT

Balachandran, J.

The plaintiffs in O.S.No.2/87 on the file of the Additional District Court, Alappuzha are the appellants and the defendants therein are the respondents.

2. O.S.No.2/87 aforesaid was instituted by the appellants for a decree declaring that the scheduled properties belong to the first appellant Trust; that the eight respondent has no right or possession thereto and that the decision in A.S.No.370/82 on the file of the Honourable High Court of Kerala will not bind them and the rights of the first appellant over the scheduled properties. We shall refer to the parties as their status are in the court below for the sake of convenience.

3. The plaintiffs alleged that the scheduled properties known as “Bhagavathy Madom” belongs to the first plaintiff Trust; that the said Trust was created by Muthu Iyen, Andi Iyen and others out of the charity fund collected from the business profits for the conduct of the fifth day 'Chirap' of Mullakkal Bhagavathy Temple in Dhanu in every Malayalam year; that the said Andi Iyen used to entrust the income to the committee for conduct of 'Chirap' in the temple; that the scheduled properties were acquired in the names of Andi Iyen and Muthu Iyen out of the funds so collected; that Andi Iyen was entrusted with the conduct of 'Chirap'; that after the death of Andi Iyen, his son Krishna Iyen looked after the Trust properties till his death in 1953; that thereafter his son Andi Iyen managed the Trust properties and conducted the 'Chirap'; that he died in 1971 issueless and his wife had predeceased him; that thereupon the second defendant claimed to be the trustee under the will executed by Andi Iyen; that

he, thereafter, executed a fraudulent sale deed in favour of the eighth defendant; that the said sale deed is void and does not confer any right on the eighth defendant in relation to the scheduled properties; that the second defendant, the brother-in-law of Andi Iyen and thereafter the third defendant were managing the affairs of the Trust for some time; that thereafter the committee elected from time to time collected rents and other income from the scheduled properties and buildings and utilised the amount and other collections made from the devotees for conduct of 'chirap'; that the eighth defendant caused officers of the first defendant Travancore Devasom Board to file O.S.No. 84/77 before the Sub Court, Alappuzha, claiming title to the scheduled properties and the eighth defendant claimed that they were the owners of the scheduled properties; that the said suit filed by the first defendant was dismissed by the Sub Court, Alappuzha, against which, they filed A.S.No.370/82 before the Honourable High Court of Kerala and the

first defendant Board and the eighth defendant colluded and compromised the suit admitting the ownership of the eighth defendant; that the eighth defendant, thus, pretending to be the owner, issued notice to defendants 4 to 7 demanding rent, for which they have no right and is against the express and implied provisions of the Trust and its objects.

4. The compromise of the suit between the first defendant and the eighth defendant is null and void and will not create any right in favour of the eighth defendant in the scheduled properties. The eighth defendant is making hasty preparations to cut and remove the trees standing in the scheduled properties and to demolish the building and other structures in the scheduled properties to harass and drive out defendants 4 to 6 from the building in the scheduled properties and that will cause irreparable injury to the devotees for whose benefit, the Trust was created and nobody will be able to collect the amount and conduct the

'chirap', if the eighth defendant does the above acts. Hence, they are to be injuncted from doing the above acts. The second and third plaintiffs further claimed that they are two devotees, who along with a good number of devotees in the locality of the above temple, are interested in conduct of fifth day 'chirap'. The suit is instituted in a representative capacity under Order I Rule 8, as the number of persons so interested are numerous.

5. The fourth defendant filed written statement supporting the plaint claim.

6. The eighth defendant resisted the suit filing a written statement contending that the suit itself is not maintainable; that there is no Trust as “Bhagavathy Madom Trust”; that the scheduled properties did not belong to any Trust; that no Trust was created, as alleged, by Muthu Iyen and Andi Iyen for conducting the fifth day 'chirap' and all allegations in respect of use of income from the scheduled properties for conduct of the fifth

day 'chirap' are false. Deed No.1675/1119 M.E. did not create any Trust in favour of Shesha Iyen and Appuswamy Iyen, but it only authorised them to conduct the 'chirap' utilising the available resources from the scheduled properties. At best, it only created a charge over the scheduled properties. That was only an internal arrangement within the family as to the mode of enjoyment of the scheduled properties. That did not confer any right upon persons, who are not parties thereto. The public or any committee have no right to compel the owner of the scheduled properties to perform any obligation stated in the document. The plaintiffs are utter strangers. The third defendant never managed the suit properties as Trust properties as alleged. He had power of attorney of the second defendant, but his rights were limited to that conferred by that power of attorney. The compromise entered into between the first defendant and the eighth defendant as a result of bona fide settlement of dispute as per the directions of the

Honourable High Court of Kerala is valid and the plaintiffs are not persons aggrieved by the said compromise. If at all the plaintiffs are aggrieved, they can only seek for setting aside the said compromise, as the compromise decree only affirms the title of the eighth defendant under sale deed in its favour. The plaintiffs have no right to interfere with the right of the eighth defendant to collect rent from defendants 4 to 7. The eighth defendant has constructed a building in the scheduled properties to be put to use to augment the income of the eighth defendant itself and the eighth defendant proposes also to re-construct the shop building in the scheduled properties. The suit is frivolous and vexatious and is filed with ulterior motives at the instance of the tenants of the building and they have no locus standi to institute such a suit in a representative manner. On the above contentions, the eighth defendant prayed for dismissal of the suit with costs.

7. On the above pleadings, the court below raised necessary issues for trial.

8. The first and the third defendants were deleted from the party array vide order on I.A.No.532/92. The fourth defendant died pending suit and his legal representative is impleaded as supplemental ninth defendant vide order on I.A.No.735/95.

9. After trial and considering the evidence adduced in the case, which consisted of the oral evidence of PWs 1 to 10 and DWs 1 and 2 and documentary evidence of Exhibits A1 to A19; B1 to B13 and C1 and C2, the court below dismissed the suit vide judgment impugned and hence this appeal.

10. The most vital issue to be decided in the case is as to whether there is any Trust described as the first plaintiff, namely, "Bhagavathy Madom Trust", as plaintiffs 2 and 3 alleged the existence of such a Trust, whereas, it is denied by the contesting eighth defendant. Unless the existence of such a Trust is established, the suit filed as a

representative suit under Section 92 of the Code of Civil Procedure will itself be not maintainable.

11. The plaintiffs relied on the decision of the Munsiff's Court, Alappuzha in O.S.No.115/1094 to contend that there exists a Trust as described as the first plaintiff. Exhibits A5 and A6 are respectively the judgment and decree in the said suit. However, there is no mention of "Bhagavathy Madom Trust" in the said judgment. The court below also observed the deposition of PW1, the third plaintiff, on this aspect that he does not know whether there is any mention of "Bhagavathy Madom Trust" in Exhibit A5 and that he has not read and understood Exhibit A5. Though he stated that "Bhagavathy Madom Trust" was formed in 1977, he admits to have not seen any record in that behalf. He admitted in cross-examination that what he wants is formation of a Trust in the name and style "Bhagavathy Madom Trust" and to have the fifth day 'chirap' conducted through a committee. He pleads ignorance when suggested that there is no such

'chirap' as 'Bhagavathy Madom Chirap' and that there is no record to that effect. He also deposed that in the Trust mentioned, there are no members and that his prayer is to have a Trust formed; that there is no committee now as mentioned in the plaint and that he is not aware as to on what basis was it so stated in the plaint that there is a committee in administration. Thus, the evidence of PW1, the third plaintiff itself showed that there is no Trust as described as the first plaintiff. Consequently, therefore, the case of plaintiffs 2 and 3 that they have instituted the suit under section 92 of the CPC for and on behalf of the Trust cannot stand. For institution of a suit under Section 92 of the CPC, there must be in existence a Trust express or constructive, for public purposes of a religious or charitable nature and there should be some breach of such Trust and some directions of the nature mentioned in Section 92(1) of the CPC are necessary for administration of the Trust.

12. PW1 has further deposed that he is nobody in the first plaintiff Trust as alleged. Hence, he has no locus standi to institute the said suit. It has been held by this Court in **Narayana Pillai v. Jyothi** (1991 (2) KLT 458) that mere residence in the locality and worship in the temple is not sufficient to have a substantive and existing interest and that the nature of interest contemplated under Section 92 of the CPC must be real, substantive and existing. The court below observed that, at best, PW1 is a worshiper of the Mullackal Bhagavathy Temple, but, that is not the Trust alleged in the plaint. In the absence of any Trust as described as the first plaintiff, the suit filed under Section 92 of the CPC itself is not maintainable, as was rightly found by the court below.

13. Though the validity of the compromise decree in A.S.No.370/82 on the file of the Honourable High Court of Kerala is assailed, the first defendant Travancore Devaswom Board, which

was a party to the suit is deleted from the party array vide order on I.A.No.532/92 and hence, the said relief is not available to the plaintiffs and omission of that prayer in the amended plaint has rendered the plaint different from the one for institution, of which, leave under Section 92 of the CPC was obtained and that also has rendered the suit not maintainable.

14. It is further seen, as rightly observed by the court below, that the suit is filed by the plaintiffs in collusion with the tenants of the scheduled building to avert eviction. The seventh defendant Vijayan, who is running Lavanya Stores in a room in the scheduled building, is the counter petitioner in R.C.P.No.13/90, filed by the eighth defendant for eviction. Further, it is admitted by PW1 that instructions to file the suit was being given by the now deceased fourth defendant, who was the counter petitioner in R.C.P.No.11/90 filed by the eighth defendant for eviction. PW1 has also admitted that the said fourth defendant, who was

the first defendant in O.S.No.152/77 was found by the court below to be a tenant under the predecessor of the eighth defendant. It is also seen that the sixth defendant is the counter petitioner in R.C.P.No.12/90 filed by the eighth defendant for eviction. Thus, the evidence in the case showed that PW1 was being hired by the tenants and the plaint itself was drafted on instructions of the now deceased fourth defendant, the predecessor of the additional ninth defendant, who was the tenant in R.C.P.No.11/90 on the file of the Rent Control Court, Alappuzha.

15. PW1 has further given evidence as regards Exhibit B17 judgment in A.S.No.370/82 on the file of the Honourable High Court of Kerala that he did not challenge the said judgment as it was acceptable to him as well. As per Exhibit B 17 judgment passed on compromise, the Mullakkal Devaswom represented by the Travancore Devaswom Board, the first defendant in the present suit, who was later removed from the party array, had

conceded the ownership of the scheduled properties as being with the eighth defendant. It goes without saying, therefore, that the third plaintiff, who accepted Exhibit B17 compromise decree, cannot assail the validity of Exhibit B12 sale deed in favour of the eighth defendant. PW1 also admitted that the 'chirap' was being conducted by the members of the family of Andi Iyen from the income derived by their family from their family properties, including the scheduled properties. To the specific question as to on what basis is it said that the scheduled properties belong to the public Trust, PW1 has replied that he is not aware. It was found by the court below, in the circumstances, that PW1 himself has admitted the right of the predecessor of the eighth defendant over the scheduled properties and alienation thereof in favour of the eighth defendant; that the first plaintiff Trust is not in existence and therefore, the question of the scheduled properties belonging to the first plaintiff Trust does not

arise at all and Exhibit A5 judgment in O.S.No. 1115/1094 M.E., however, cannot operate as res judicata in view of Exhibit B17 judgment delivered thereafter and also in view of the fact that the parties to the two suits are different. The findings of the court below as above cannot be faulted. There is no merit in this appeal and the appeal deserves only to be dismissed with costs to the eighth defendant.

In the result, we dismiss this appeal with costs to the eighth defendant.

(J.B.Koshy, Judge)

27th June, 2007

(K.P.Balachandran, Judge)

tkv

J.B.Koshy & K.P.Balachandran, JJ.

A.S.No.238 of 1996

JUDGMENT

27th June, 2007